

**Office of Zoning and Administrative Hearings
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HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. SUMMARY

The subject property is a commercial area within the Flower Hill Subdivision, a community of some 2,000 homes in the Planned Neighborhood (PN) Zone in Gaithersburg. The subject property contains approximately 15 acres of land located in the southwest corner of the intersection of Woodfield Road (MD 124) and Muncaster Mill Road/Snouffer School Road. The property was designated for commercial use on the previously approved development plan and site plan. Currently, the 15-acre site has four two-story office buildings, a fast-food restaurant, a bank, a gas station, a convenience store/sandwich stop, and an undeveloped parcel that was originally slated for commuter parking but remains vacant. The Applicant, Pettit Companies, was the original developer of the site and now seeks to amend the development plan to add 66,000 square feet of commercial and retail space. Specifically, the Applicant proposes to construct three additional two-story office buildings, one on the vacant parcel and the other two on areas now covered by excess surface parking.

The present application was recommended for approval by the Planning Board and its Technical Staff. Community participation has been limited to a single letter in support from the Flower Hill Central Corporation. The Hearing Examiner recommends approval on grounds that the additional development would not change the character of the site, would be consistent with the purposes and standards of the Planned Neighborhood Zone, would substantially comply with the recommendations of the applicable master plan and would be compatible with surrounding development.

II. STATEMENT OF THE CASE

The original zoning for the Flower Hill Subdivision was approved in 1969, in LMA No. E-772, covering some 249 acres. See Hearing Examiner's Report and Recommendation dated June 11, 1984 in DPA No. 84-1 and LMA Nos. G-420, G-421 and G-422. In a development plan amendment application and three local map amendments granted in 1986, the District Council granted requests to add more acreage to the Flower Hill Subdivision and develop part of the existing

undeveloped acreage for townhouses. See *id.* The present application, DPA No. 07-2, was filed on March 29, 2007 by Applicant Pettit Companies, which is an entity owned by the Pettit family, the developer of the Flower Hill Subdivision. This application requests approval for an amendment to the development plan that was approved in 1985 in connection with Local Map Amendment G-420. G-420 rezoned approximately 62 acres of land from the R-200 Zone to the Planned Neighborhood Zone, adding that acreage to the Flower Hill Subdivision. The site plan approved subsequent to that rezoning designated the subject site for commercial and retail use up to a total of 90,370 square feet. The site plan approval anticipated that additional commercial development might take place on the site, but required a new adequate public facilities review before additional development could be approved or added. See Staff Report at 2. The Applicant now seeks to construct 66,000 additional square feet of commercial building space on the subject site.

The present application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") who, in a report dated November 19, 2007, recommended *approval*. See Ex. 31. The Montgomery County Planning Board ("Planning Board") considered the application on November 29, 2007 and, by a vote of 5 to 0, recommended *approval*. See Ex. 32. The Planning Board recommended a series of textual binding elements to be added to the development plan, all of which have been accepted by the Applicant and (with certain revisions) are shown on the proposed development plan amendment.

Under Section 59-D-1.74(d) of the Zoning Ordinance, the Hearing Examiner must conduct a hearing in a DPA case if there is public opposition to the application, or if a hearing is recommended by the Planning Board or requested by an aggrieved party within ten days of the Planning Board's consideration of the case. The Staff Report in this case, which was adopted by the Planning Board, stated that the application should be reviewed by the Hearing Examiner. Accordingly, a public hearing was scheduled for October 22, 2007. The hearing was later rescheduled, at the request of the Applicant and Technical Staff, to December 7, 2007. The public hearing was convened on December 7, 2007 and concluded on December 17, 2007. As required under Section 59-D-1.74(d) of the Zoning Ordinance, the record closed that day.

III. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter.

Conflicts in the evidence are resolved under the preponderance of the evidence test.

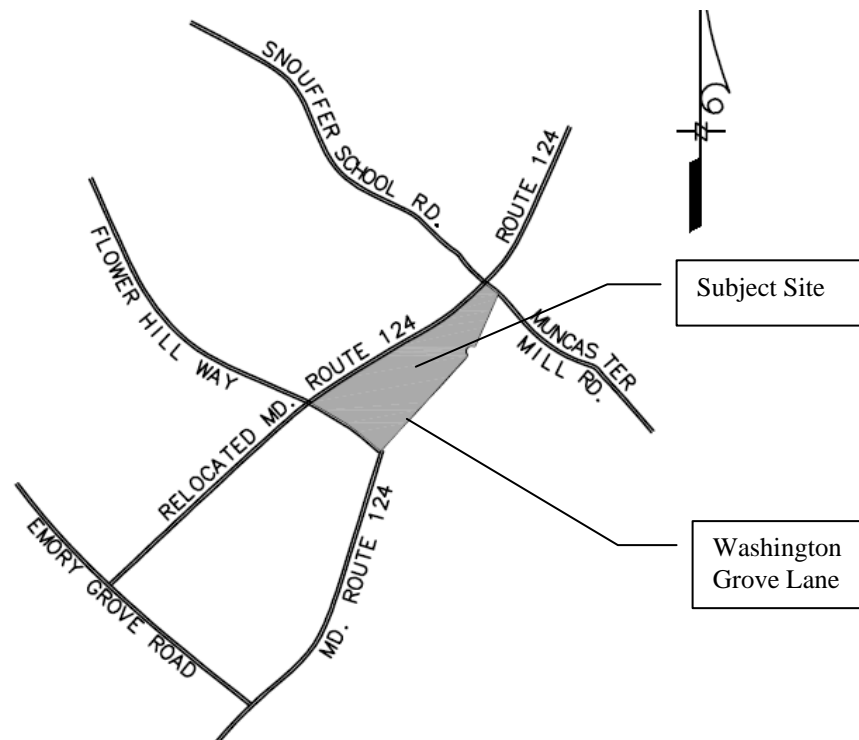
A. Subject Property

The subject property contains a total of approximately 15 acres of land known as the Flower Hill Professional Center, which was identified as part of Master Plan Parcel 31 in LMA No. G-420. The subject property is located in the southwest corner of the intersection of Woodfield Road (MD 124) and Muncaster Mill Road/Snouffer School Road in Gaithersburg. The requested development plan amendment would directly affect only three of the eight parcels contained in the Flower Hill Professional Center (Parcels A-3, A-4 and A-9), but for ease of reference, the entire 15-acre professional center will be referred to as the “subject property” or “subject site.” When necessary, the individual parcels proposed for additional development will be referred to by parcel number.

The subject property is almost entirely bordered by roads: Woodfield Road (MD Rte. 124) to the north, Flower Hill Way to the west, Washington Grove Lane along most of the southern boundary, and Muncaster Mill Road to the east, where the property tapers to a point. The property’s Washington Grove Lane frontage is occupied by four two-story office buildings, one on Parcel A-3 and three on Parcel A-4. In the north half of the site, along Woodfield Road, are a McDonald’s Restaurant at the corner of Woodfield Road and Flower Hill Way (Parcel A-5), a gas station (Parcel A-6), a small bank (Parcel A-7) and a convenience store with a Jerry’s Sub Shop (Parcel A-8). Parcel A-9 occupies a triangular piece of land at the northern end of the site and is currently undeveloped, although it was designated on the last approved development plan for a commuter parking lot. The eighth parcel is Parcel A-10, which consists of the interior roadway within the subject property, providing access and circulation throughout the site. The site has a comprehensive network of sidewalks both within the site, providing pedestrian access among the various buildings, and along the abutting roadways, providing pedestrian access between the site and adjoining developments.

The subject property has no forest stands, specimen trees, streams, wetlands, steep slopes or erodible soils. Vegetation is limited to landscape plantings along sidewalks and in parking areas, as well as grass on the vacant Parcel A-9. The general location of the subject property may be seen on the vicinity map below.

Vicinity Map, excerpted from Ex. 36

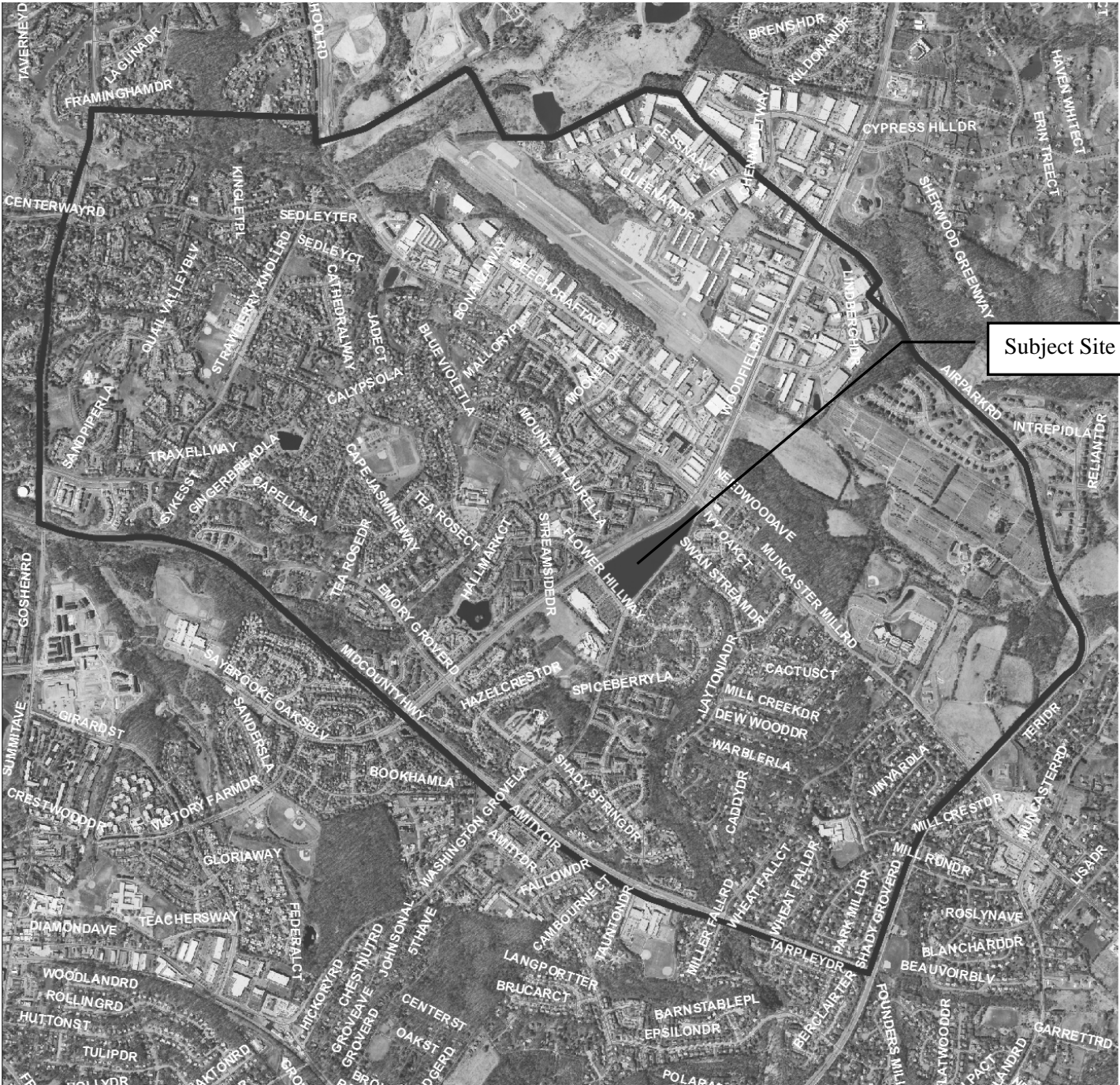


B. Surrounding Area

Like a floating zone case, the surrounding area must be identified in a development plan amendment case so that compatibility can be evaluated properly. In general, the description of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, the Hearing Examiner accepts Technical Staff's recommendation (see Staff Report, Ex. 31 at 3) and designates as the surrounding area as that area generally bounded by Montgomery County Airpark to the north, Airpark Road to the east, Mid-County Highway to the west and Goshen Road to the northwest. In so doing, the Hearing Examiner recognizes, as stated by the Applicant's land planner, that this surrounding area is quite large, and

that the impacts of the proposed rezoning become more attenuated as distance increases. The surrounding area may be seen in the aerial photograph below, which was provided by Technical Staff.

Surrounding Area, from Ex. 34(b)



The surrounding area as described above contains a mix of uses and zones. The subject site is bordered on two and two-thirds sides and at the tip of the triangle by public roads. Washington Grove Lane ends in a cul de sac about two-thirds of the way along the property's southern boundary. Past the cul de sac, Parcel A-9 of the subject property abuts vacant land that was part of the MD 124 right-of-way before the road was relocated. The property is still in public ownership, but has been planted in grass and is unused. The right-of-way line is demarcated by a row of telephone poles. On the other side of the old right-of-way from Parcel A-9 is a townhouse community in the R-60 Zone, which is part of the Emory Grove Subdivision. The Emory Grove townhouses sit at a higher elevation than Parcel A-9, estimated to be 20 to 25 feet above the grade of the proposed new office building. See Tr. Dec. 17 at 16-18. They are oriented with the sides or back corners of the townhouses facing the subject property, and the closest townhouse is about 110 feet from the location proposed for the new building on Parcel A-9.

Parcels A-3 and A-4 of the subject property confront single-family detached homes in the Emory Grove subdivision across Washington Grove Lane. These homes are roughly the same distance from the subject property as the townhouses confronting Parcel A-9. Farther south are additional homes in the R-60 Zone.

To the west, across Flower Hill Way, the subject property confronts the Flower Hill Shopping Center in the Planned Neighborhood Zone, which is anchored by a Giant grocery store and owned by a Pettit family company. Beyond the shopping center are residential neighborhoods in the R-60 Zone. To the north, across Woodfield Road, the subject property confronts townhouses in the Planned Neighborhood Zone that are part of the Flower Hill Subdivision. Farther north is the bulk of the Flower Hill Subdivision, consisting of a variety of housing types in the Planned Neighborhood Zone, with two parks and a school. To the east, the triangle-tip of the subject property points towards the intersection of Woodfield Road with Muncaster Mill Road (to the south) and Snouffer School Road (to the north). North of this intersection is the Montgomery County Airpark, and to the northeast are properties in the C-1 (Convenience Commercial) and C-T (Commercial, Transitional) Zones.

The aerial photograph below, which the Hearing Examiner downloaded from Google Earth, shows the relationship of the subject site to its immediate surroundings.¹

Aerial Photograph from Google Earth



¹ The hearing Examiner hereby takes official notice of the widely recognized mapping capabilities of the computer program Google Earth.

C. Proposed Development

The Applicant has experienced a low vacancy rate at the subject site for the past several years, accompanied by requests from several tenants for additional space and for a sit-down restaurant on site. In response, the Applicant proposes to add three buildings to the subject commercial center, for a total of 66,000 additional square feet. The buildings are intended primarily for commercial office use, but the Applicant hopes to attract a sit-down restaurant and to provide a larger space for a health and fitness club that currently occupies eight units in another building on site. One building is proposed for Parcel A-3, adjacent to an existing office building. The second building is proposed for Parcel A-4, across a surface parking area from three existing office buildings. On both of these parcels, the new buildings would replace surface parking spaces that the Applicant and Technical Staff consider to be in excess of the site's needs. The new building on Parcel A-4 would also include underground parking spaces, taking advantage of a change in grade that allows a third story visible only from the north. On the currently vacant Parcel A-9, the Applicant proposes to build a new office building, associated surface parking, drive aisles and walkways, and an above-ground stormwater management quality control facility.

Pursuant to Code § 59-D-1.11, development under the Planned Neighborhood Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the zone. This development plan must contain several elements, including a land use plan showing site access, the locations and uses of all buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. Additional required submissions include a natural resources inventory/forest stand delineation and an “economic analysis supporting the inclusion of any proposed local commercial facilities as permitted in” the zone. Code §59-D-1.3(h).

As a general matter, the development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual, and the site plan approved by the Planning Board must conform to all non-illustrative elements of the development plan approved by the

District Council. See Code § 59-D-1.2. Thereafter, an approved development plan may be amended only by application to the District Council.

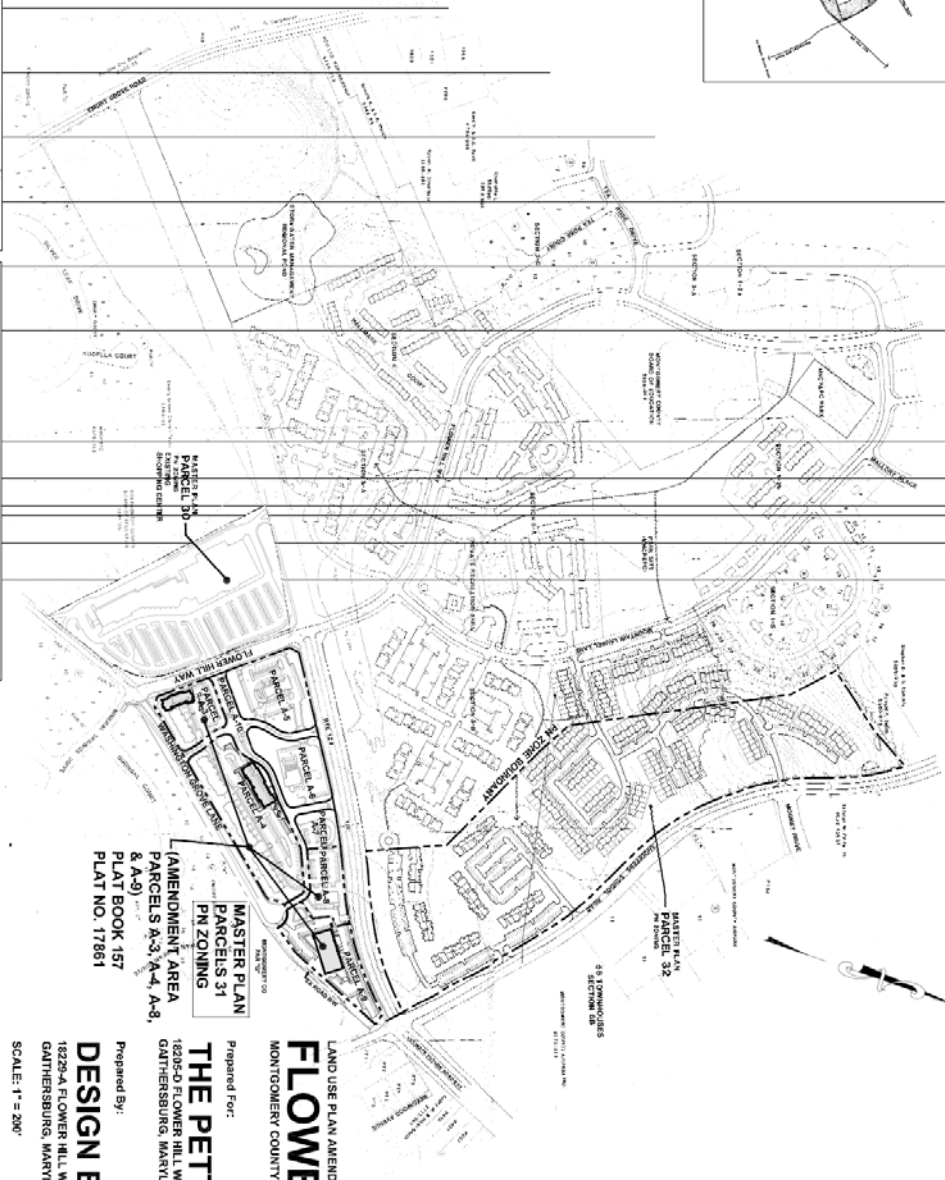
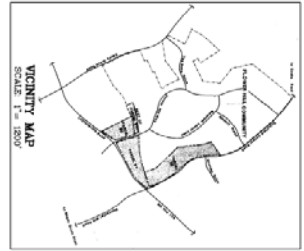
The principal component of the development plan amendment proposed in this case is a document entitled “Land Use Plan Amendment,” Exhibit 46, hereinafter referred to as the Development Plan Amendment. This document presents the development plan that was approved in conjunction with LMA No. G-420, which has been revised to show the existing development on the site, the improvements now proposed to be added and a list of textual binding elements. Additional required elements have been submitted in the form of a Development/Land Use Plan for Parcels A-3, A-4, A-8 and A-9 (Ex. 36) which provides a more detailed view of the proposed improvements²; a zoning map (Ex. 7); a natural resources inventory/forest stand delineation (“NRI/FSD”) (Ex. 8); and two economic analyses of the market for the proposed commercial spaces in the area of the site (Exs. 10 and 42).

The entire Development Plan Amendment is depicted on the next page. Due to the difficulty of reading it at this scale, its components are reproduced separately on the pages that follow.

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² Parcel A-8 is referenced as part of the Amendment Area for purposes of parking calculations.

Development Plan Amendment, Ex. 46



FLOWER HILL SECTION ANALYSIS						
SECTION	REMARKS	NO. OF SAMPLES	NO. OF TESTS	PERCENTAGE PASSING	PERCENTAGE FAILING	TOTAL
1	100% PASS	10	10	100	0	100
2	100% PASS	10	10	100	0	100
3	100% PASS	10	10	100	0	100
4	100% PASS	10	10	100	0	100
5	100% PASS	10	10	100	0	100
6	100% PASS	10	10	100	0	100
7	100% PASS	10	10	100	0	100
8	100% PASS	10	10	100	0	100
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58	100% PASS	10	10	100	0	100
59	100% PASS	10	10	100	0	100
60	100% PASS	10	10	100	0	100

EXPOSURE DATA		DATE (YR) AND POPULATION		CUMULATIVE EXPOSURE (YR AND HOURS/PERSON)		CUMULATIVE EXPOSURE (YR AND HOURS/PERSON)	
Age Group	Sex	Year	Population	Year	Population	Year	Population
0-14	M	1960	100	1960	100	1960	100
15-24	F	1960	100	1960	100	1960	100
25-34	M	1960	100	1960	100	1960	100
35-44	F	1960	100	1960	100	1960	100
45-54	M	1960	100	1960	100	1960	100
55-64	F	1960	100	1960	100	1960	100
65-74	M	1960	100	1960	100	1960	100
75-84	F	1960	100	1960	100	1960	100
85-94	M	1960	100	1960	100	1960	100
95-104	F	1960	100	1960	100	1960	100
105-114	M	1960	100	1960	100	1960	100
115-124	F	1960	100	1960	100	1960	100
125-134	M	1960	100	1960	100	1960	100
135-144	F	1960	100	1960	100	1960	100
145-154	M	1960	100	1960	100	1960	100
155-164	F	1960	100	1960	100	1960	100
165-174	M	1960	100	1960	100	1960	100
175-184	F	1960	100	1960	100	1960	100
185-194	M	1960	100	1960	100	1960	100
195-204	F	1960	100	1960	100	1960	100
205-214	M	1960	100	1960	100	1960	100
215-224	F	1960	100	1960	100	1960	100
225-234	M	1960	100	1960	100	1960	100
235-244	F	1960	100	1960	100	1960	100
245-254	M	1960	100	1960	100	1960	100
255-264	F	1960	100	1960	100	1960	100
265-274	M	1960	100	1960	100	1960	100
275-284	F	1960	100	1960	100	1960	100
285-294	M	1960	100	1960	100	1960	100
295-304	F	1960	100	1960	100	1960	100
305-314	M	1960	100	1960	100	1960	100
315-324	F	1960	100	1960	100	1960	100
325-334	M	1960	100	1960	100	1960	100
335-344	F	1960	100	1960	100	1960	100
345-354	M	1960	100	1960	100	1960	100
355-364	F	1960	100	1960	100	1960	100
365-374	M	1960	100	1960	100	1960	100
375-384	F	1960	100	1960	100	1960	100
385-394	M	1960	100	1960	100	1960	100
395-404	F	1960	100	1960	100	1960	100
405-414	M	1960	100	1960	100	1960	100
415-424	F	1960	100	1960	100	1960	100
425-434	M	1960	100	1960	100	1960	100
435-444	F	1960	100	1960	100	1960	100
445-454	M	1960	100	1960	100	1960	100
455-464	F	1960	100	1960	100	1960	100
465-474	M	1960	100	1960	100	1960	100
475-484	F	1960	100	1960	100	1960	100
485-494	M	1960	100	1960	100	1960	100
495-504	F	1960	100	1960	100	1960	100
505-514	M	1960	100	1960	100	1960	100
515-524	F	1960	100	1960	100	1960	100
525-534	M	1960	100	1960	100	1960	100
535-544	F	1960	100	1960	100	1960	100
545-554	M	1960	100	1960	100	1960	100
555-564	F	1960	100	1960	100	1960	100
565-574	M	1960	100	1960	100	1960	100
575-584	F	1960	100	1960	100	1960	100
585-594	M	1960	100	1960	100	1960	100
595-604	F	1960	100	1960	100	1960	100
605-614	M	1960	100	1960	100	1960	100
615-624	F	1960	100	1960	100	1960	100
625-634	M	1960	100	1960	100	1960	100
635-644	F	1960	100	1960	100	1960	100
645-654	M	1960	100	1960	100	1960	100
655-664	F	1960	100	1960	100	1960	100
665-674	M	1960	100	1960	100	1960	100
675-684	F	1960	100	1960	100	1960	100
685-694	M	1960	100	1960	100	1960	100
695-704	F	1960	100	1960	100	1960	100
705-714	M	1960	100	1960	100	1960	100
715-724	F	1960	100	1960	100	1960	100
725-734	M	1960	100	1960	100	1960	100
735-744	F	1960	100	1960	100	1960	100
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765-774	M	1960	100	1960	100	1960	100
775-784	F	1960	100	1960	100	1960	100
785-794	M	1960	100	1960	100	1960	100
795-804	F	1960	100	1960	100	1960	100
805-814	M	1960	100	1960	100	1960	100
815-824	F	1960	100	1960	100	1960	100
825-834	M	1960	100	1960	100	1960	100
835-844	F	1960	100	1960	100	1960	100
845-854	M	1960	100	1960	100	1960	100
855-864	F	1960	100	1960	100	1960	100
865-874	M	1960	100	1960	100	1960	100
875-884	F	1960	100	1960	100	1960	100
885-894	M	1960	100	1960	100	1960	100
895-904	F	1960	100	1960	100	1960	100
905-914	M	1960	100	1960	100	1960	100
915-924	F	1960	100	1960	100	1960	100
925-934	M	1960	100	1960	100	1960	100
935-944	F	1960	100	1960	100	1960	100
945-954	M	1960	100	1960	100	1960	100
955-964	F	1960	100	1960	100	1960	100
965-974	M	1960	100	1960	100	1960	100
975-984	F	1960	100	1960	100	1960	100
985-994	M	1960	100	1960	100	1960	100
995-1000	F	1960	100	1960	100	1960	100

[illegible]

LAND USE PLAN AMENDMENT
FLOWER HILL
MONTGOMERY COUNTY
MARYLAND

Prepared For:
THE PETTIT COMPANIES
1829-S-O FLOWER HILL, WAY
GATHERSBURG, MARYLAND 20873

Prepared By:
DESIGN ENGINEERING INC.
1829-S FLOWER HILL, WAY
GATHERSBURG, MARYLAND 20873

SCALE: 1" = 200'
FEBRUARY 2007
REV. 3-8-07

LAND USE PLAN AMENDMENT
FLOWER HILL
MONTGOMERY COUNTY MARYLAND

Prepared For:

THE PETTIT COMPANIES
18205-D FLOWER HILL WAY
GAITHERSBURG, MARYLAND 20879

Prepared By:

GATHERSBURG, MARYLAND 20879

SCALE: 1" = 200'

FEBRUARY 2007
(REV. 9-18-07)

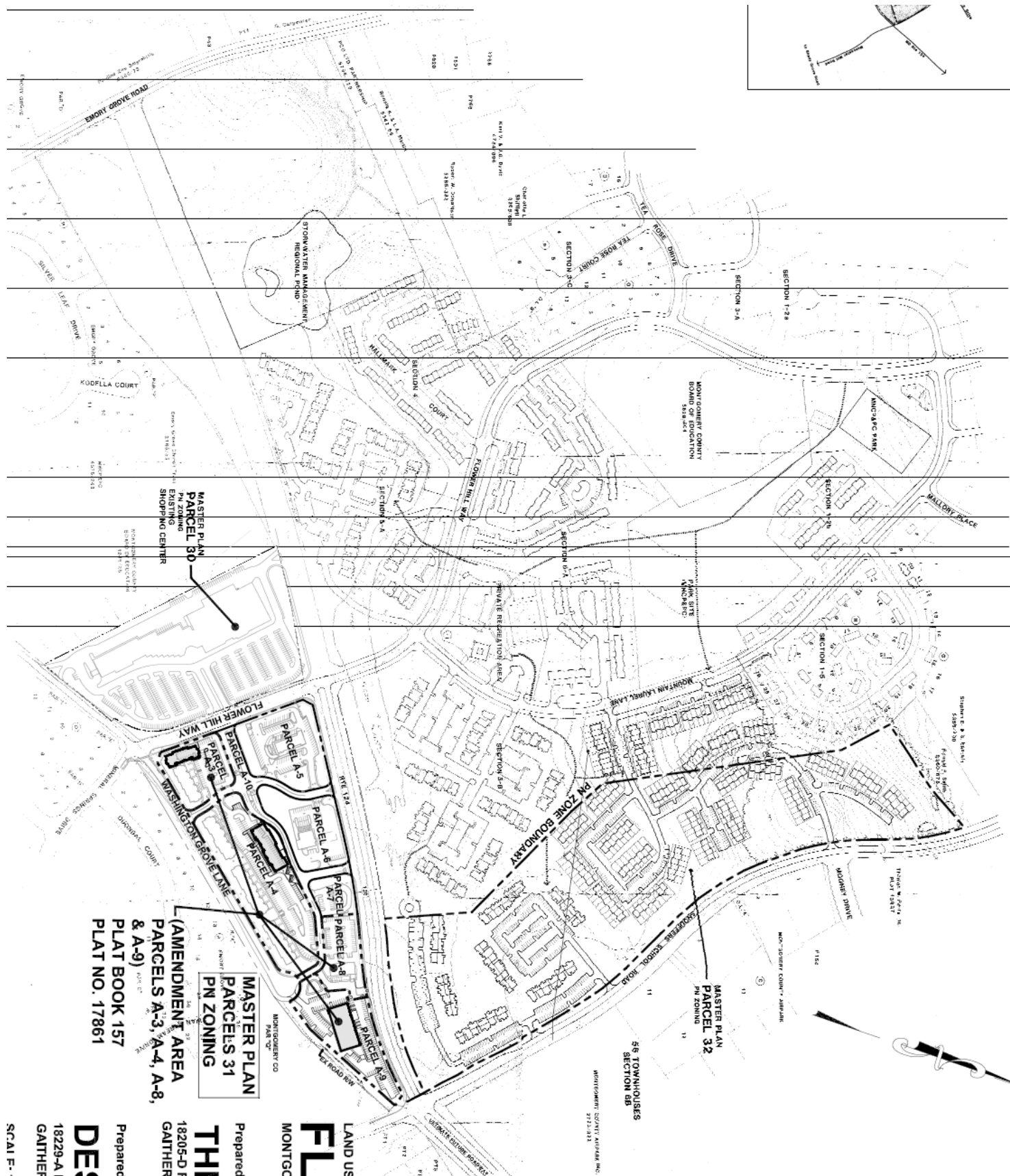
LEGEND	
	ADJUTANT GENERAL'S OFFICE
	EXISTING CONCERNS
	EXISTING TRAIL LINE
	EXISTING TOWNHOUSE UNIT
	EXISTING MULTI-FAMILY UNIT
	EXISTING IMPROVING CENTER
	EXISTING OPEN SPACE/PATHWAY
	PROPOSED COMMERCIAL
	EXISTING COMMERCIAL

EXHIBIT 46

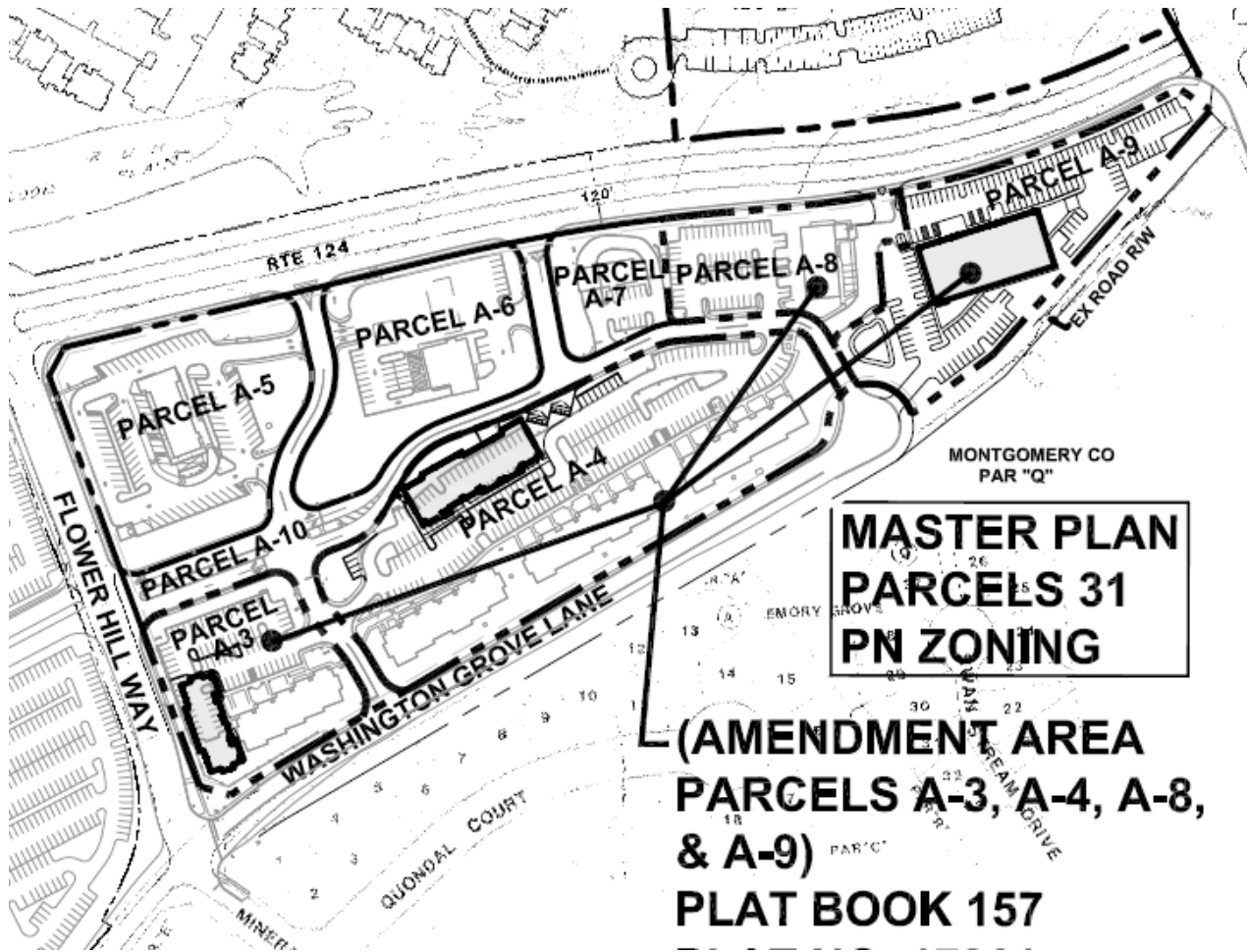
WORKING PAPERS

1. The effect of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.
2. The impact of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.
3. The impact of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.
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6. The impact of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.
7. The impact of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.
8. The impact of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.
9. The impact of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.
10. The impact of regional characteristics on educational attainment: a cross-country analysis of the impact of regional characteristics on educational attainment. *Journal of Human Capital*, 2004, 2(1), 1-24.

Development Plan Amendment, graphics only, from Ex. 46





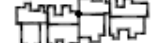






Close-in View of Subject Property from Development Plan Amendment, Ex. 46



Development Plan Amendment Legend, from Ex. 46

LEGEND

-  AMENDMENT AREA BOUNDARY
-  EXISTING CONTOURS
-  EXISTING TREE LINE
-  EXISTING TOWNHOUSE UNIT
-  EXISTING MULTI-FAMILY UNIT
-  EXISTING SHOPPING CENTER
-  EXISTING OPEN SPACE PATHWAY
-  PROPOSED COMMERCIAL
-  EXISTING COMMERCIAL

Textual Binding Elements from Development Plan Amendment, Ex. 46**BINDING ELEMENTS**

1. The development is limited to an additional 66,000 square feet of commercial uses for an estimated total of 168,000 square feet (total on Parcels A-3 thru A-9) to be confirmed or adjusted at APF review). Parcel A-8 is shown on this Plan for the purposes of parking calculations only. ^{total new} resulting in a maximum of 3 additional buildings.
2. The development is limited to those commercial uses, which would generate no greater than 134 additional new morning peak hour vehicular trips and 139 additional new evening peak hour vehicular trips.
3. The Applicant shall submit a Landscape Plan to be approved in conjunction with site plan approval.
4. The area of the Project intended for common or quasi-public use is noted and shown as Parcel A-10. Parcel A-10 is owned by the Flower Hill Business Association (the "Association"), which has sole responsibility for maintenance and repair of Parcel A-10. Covenants applicable to all parcels of the Property were recorded on September 11, 1990 at Liber 9473, folio 324 in the Land Records of Montgomery County, Maryland. The Applicant is a participating member of the Association.
5. Access to the Project shall be by seven (five existing and two proposed) vehicular entrances and exits. Three entrances/exits are on Woodfield Road, two existing and one proposed (right-in right-out or right-out to be confirmed at Site Plan), on the north side of the Property, leading to a private access road which runs the length of Parcel A-10. On the South side of the Property, there are two existing entrances/exits from Washington Grove Road and one proposed entrance/exit directly connected to Parcel A-9. On the west side of the Property there is one existing entrance/exit on Flower Hill Way. Cross easements for parking and access applicable to all parcels on the Property were recorded in the Land Records of Montgomery County, Maryland at on September 11, 1990 at Liber 9473, folio 324.
6. The maximum building coverage on Parcels A-3, A-4, A-8, & A-9 will be 20% of the total site area of Parcels A-3, A-4, A-8, & A-9.
7. The minimum setbacks will be 70 feet from Woodfield Road, 15 feet from Washington Grove Road, and 15 feet from Flower Hill Way.

Textual Binding Elements from Development Plan Amendment, Ex. 46, cont.

8. At the time of APF review, the applicant must satisfy the County Council's newly enacted FY 2007-2009 Growth Policy that includes:

(a) For Local Area Transportation Review (LATR), satisfying a lower Critical Lane Volumes (CLV) congestion standard for the policy area;

(b) A Policy Area Mobility Review (PAMR) test that requires trip mitigation of developments located in certain policy areas.

9. At site plan review the applicant must show a detailed plan of the necessary lead-in sidewalks, internal sidewalks, pedestrian crosswalks, handicapped ramps, and pedestrian access in the southeast corner of the subject site.

10. The applicant must provide inverted-U bike racks for customers and employees with the ultimate number and location to be determined at site plan review.

11. The maximum height of all proposed buildings shall be 30 feet in accordance with the standards of the C-1 Zone as set forth in Section 59-C-4.342 of the Zoning Ordinance.

The three tables at the bottom of the Development Plan Amendment sheet are not reproduced in a larger scale here because they pertain to calculations made during earlier approvals, largely dealing with residential density issues, and are not relevant to the present application.

The drawing reproduced on the next page is a more detailed land use plan for the subject property, submitted as part of this application. It is shown below in full, with the various components provided in a larger scale on the pages that follow.

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**Site Plan Notes from Development/Land Use Plan for
Parcels A-3, A-4, A-8 and A-9, from Ex. 36 (upper left corner)**

1. THE BUILDING HEIGHT IS BASED ON THE AVERAGE GRADE ALONG THE FRONT OF THE BUILDING. FINAL HEIGHT MEASUREMENT IS SUBJECT TO REVIEW AND ADJUSTMENT BY THE PLANNING BOARD AT SITE PLAN APPROVAL.
2. THE MINIMUM SETBACKS WILL BE FEET.
3. THE MINIMUM GREEN SPACE WILL BE OF THE GROSS TRACT AREA.
4. ALL GREEN AREAS (INCLUDING THE ACTIVE/PASSIVE RECREATION) WILL BE ACCESSIBLE TO ALL USERS/OCCUPANTS OF PROPOSED & EXISTING BUILDINGS.
5. THE MAXIMUM BUILDING COVERAGE WILL BE REQUIRED OF THE SITE AREA.
6. THE MINIMUM NUMBER OF PARKING SPACES WILL COMPLY WITH THE ZONING ORDINANCE.
7. THIS PROPERTY IS SUBJECT TO A COMMON DRIVEWAY AGREEMENT RECORDED AT LIBER 9473 FOLIO 324 AMONG THE LAND RECORDS FOR MONTGOMERY COUNTY. THE COMMON DRIVEWAY AGREEMENT SETS FORTH THE AGREEMENT BETWEEN THE SUBJECT PROPERTY OWNERS AND THE ADJACENT PROPERTY OWNER TO SHARE CERTAIN PORTIONS OF THEIR RESPECTIVE PROPERTIES FOR MUTUAL INGRESS AND EGRESS FROM WOODFIELD ROAD, FLOWER HILL WAY, AND WASHINGTON GROVE ROAD IN ORDER TO ACHIEVE MORE EFFICIENT, CONVENIENT, AND SAFER ACCESS TO ALL PROPERTIES.
8. APPLICANT SHALL SUBMIT A STORM WATER MANAGEMENT CONCEPT PLAN TO BE APPROVED PRIOR TO SITE PLAN.
9. THE PROJECT SHALL BE LIMITED TO THREE (3) COMMERCIAL BUILDINGS CONSISTING OF: (I) A TWO-STORY, 12,000 SQUARE FOOT COMMERCIAL BUILDING ON PARCEL A-3; (II) A TWO-STORY, 24,000 SQUARE FOOT COMMERCIAL BUILDING AND INTEGRATED PARKING STRUCTURE ON PARCEL A-4; AND (III) A TWO-STORY, 30,000 SQUARE FOOT COMMERCIAL BUILDING, AND ASSOCIATED SURFACE PARKING ON PARCEL A-9 (COLLECTIVELY "THE PROJECT"). PARCEL A-8 IS SHOWN ON THIS PLAN FOR THE PURPOSE OF PARKING CALCULATIONS ONLY.
10. APPLICANT SHALL SUBMIT A LANDSCAPE PLAN TO BE APPROVED PRIOR TO SITE PLAN APPROVAL.
11. THE AREA OF THE PROJECT INTENDED FOR COMMON OR QUASI-PUBLIC USE IS NOTED AND SHOWN AS PARCEL A-10. PARCEL A-10 IS OWNED BY THE FLOWER HILL BUSINESS ASSOCIATION (THE "ASSOCIATION"). THE ASSOCIATION HAS SOLE RESPONSIBILITY FOR MAINTENANCE AND REPAIR OF PARCEL A-10. COVENANTS, APPLICABLE TO ALL PARCELS OF THE PROPERTY, WERE RECORDED ON SEPTEMBER 11, 1990 AT LIBER 9473 FOLIO 324 IN THE LAND RECORDS OF MONTGOMERY COUNTY. THE APPLICANT IS A PARTICIPATING MEMBER OF THE ASSOCIATION.
12. ACCESS TO THE PROJECT SHALL BE BY FIVE (FOUR EXISTING AND ONE PROPOSED) VEHICULAR ENTRANCES/EXITS AND ONE PROPOSED ENTRANCE/EXIT. THREE ENTRANCES/EXITS ARE ON WOODFIELD ROAD, TWO EXISTING AND ONE PROPOSED, ON THE NORTH SIDE OF THE PROPERTY, LEADING TO A PRIVATE ACCESS ROAD THAT RUNS THE LENGTH OF PARCEL A-10. ON THE SOUTH SIDE OF THE PROPERTY THERE ARE TWO ENTRANCES/EXITS FROM WASHINGTON GROVE ROAD. ON THE WEST SIDE OF THE PROPERTY THERE IS ONE ENTRANCE/EXIT ON FLOWER HILL WAY. CROSS EASEMENTS FOR PARKING AND ACCESS, APPLICABLE TO ALL PARCELS ON THE PROPERTY, WERE RECORDED IN THE LAND RECORDS OF MONTGOMERY COUNTY ON, SEPTEMBER 11, 1990 AT LIBER 9473 FOLIO 324.
13. THE MAXIMUM BUILDING COVERAGE WILL BE 19.9 % OF THE SITE AREA.
14. THE MINIMUM SETBACKS WILL BE 75 FEET FROM WOODFIELD ROAD, 17 FEET FROM WASHINGTON GROVE ROAD, AND 17 FEET FROM FLOWER HILL WAY.

Site Information and General Notes from Development/Land Use Plan for Parcels A-3, A-4, A-8 and A-9, Ex. 36

SITE INFORMATION

LOT AREA (PARCEL 31)	649,338 SQ.FT.
(PARCELS A-3 THRU A-10)	
PARCEL A-3	60,919 SQ.FT.
PARCEL A-4	117,826 SQ.FT.
PARCEL A-8	49,758 SQ.FT.
PARCEL A-9	92,652 SQ.FT.
GROSS TRACT AREA (PARCELS A-3, A-4, A-8, & A-9)	381,155 SQ.FT.
EXISTING ZONING	PN
TOTAL DENSITY EXISTING & PERMITTED (A-3, A-4, A-8, & A-9)	83,188 SQ. FT. (BUILT IN ACCORDANCE W/ APPROVED DEVELOPMENT PLAN & SITE PLAN)
GREENSPACE REQUIRED	NONE
GREENSPACE PROVIDED	
PARCEL A-3	29,889 SQ.FT. (49.0%)
PARCEL A-4	52,515 SQ.FT. (29.5%)
PARCEL A-8	18,351 SQ.FT. (36.8%)
PARCEL A-9	32,450 SQ.FT. (35.0%)



GENERAL NOTES

1. NRI/FSD & FOREST CONSERVATION NOTE: NRI/FSD #4-07013 WAS APPROVED ON 09/15/06. FOREST CONSERVATION WILL BE SATISFIED BY OFF-SITE MITIGATION WITH FEE IN LIEU.
2. STORMWATER MANAGEMENT NOTE: THE SITE DRAINS TO A REGIONAL SWM FACILITY. MCDPS HAS CONFIRMED THAT SWM CONCEPT PLAN REVIEW IS NOT NECESSARY PRIOR TO THE APPROVAL OF DEVELOPMENT PLAN AMENDMENT.
3. SEDIMENT CONTROL NOTE: SEDIMENT CONTROL PERMIT WILL BE OBTAINED FROM MCDPS IN CONJUNCTION WITH BUILDING PERMIT.
4. LIGHTING NOTE: THE SITE LIGHTING WILL BE PROVIDED TO CONFORM TO M-NCPPC REQUIREMENTS AND WILL BE COORDINATED DURING SITE PLAN REVIEW PROCESS.
5. FLOOD ZONE DESIGNATION: SUBJECT PROPERTY LIES WITHIN ZONE X, AREAS OF NOMINAL FLOODING AS SHOWN ON F.E.M.A. N.F.I.P., F.I.R.M. COMMUNITY PANEL NO.24031C0191 & 24031C0193D, REVISION DATED SEPT.29, 2006.

**Development Standards Table from Development/Land Use Plan for
Parcels A-3, A-4, A-8 and A-9, Ex. 36**

DEVELOPMENT STANDARDS			
PN ZONE			
ITEM	CODE REQUIREMENT		PROVIDED
LOT AREA	None		60,919 SF for Parcel A-3 177,826 SF for Parcel A-4 92,652 SF for Parcel A-9 49,758 SF for Parcel A-8
BUILDING COVERAGE	None		23.0% for Parcel A-3 40.5% for Parcel A-4 9.6 % for Parcel A-9 16.8% for Parcel A-8
FRONT SETBACK (From R/W)	None		29' from Washington Grove Rd. (Bldg 1) 182' from Washington Grove Rd. (Bldg 2) 75' from Woodfield Road for Bldg 3
SIDE SETBACK	None		17.7' from Flower Hill Way (Bldg 1) 410' from Flower Hill Way (Bldg 2) 32' from Washington Road (Bldg 3)
REAR SETBACK	None		15' for Bldg 2 from Parcel A-10 line 55' for Bldg 3 from Parcel A-8 line 35' for Bldg 2 from Parcel A-6 Line
LOT FRONTAGE	None		232' (for Parcel A-3 (Flower Hill Way) 754' for Parcel A-8 (Washington Grove Rd.) 416' (for Parcel A-9) (Woodfield Rd.)
BUILDING HEIGHT	Existing = 2 stories		2 stories (< 30 feet) for all Proposed Buildings (Building 1, 2, & 3)

Parking Data from Development/Land Use Plan for Parcels A-3, A-4, A-8 and A-9, Ex. 36

PARKING REQUIRED W/O MIXED USE REDUCTION

PARCEL A-3 (PROPOSED 12,000 SQ.FT. COMMERCIAL)	36 SPACES
PARCEL A-3 (EX. 12,800 SQ. FT. COMMERCIAL)	40 SPACES
PARCEL A-4 (PROPOSED 24,000 SQ.FT. COMMERCIAL - RESTAURANT & OFFICE USE)	93 SPACES
PARCEL A-4 (EXISTING 60,000 SQ FT. COMMERCIAL - OFFICE USE)	180 SPACES
PARCEL A-8 (NO PROPOSED BUILDING)	0 REQUIRED
PARCEL A-8 (EXISTING 4,692 SQ. FT. COMMERCIAL - RETAIL & RESTAURANT USE)	42 SPACES
PARCEL A-9 (PROPOSED 30,000 SQ.FT. COMMERCIAL - HEALTH CLUB & OFFICE USE)	113 SPACES
PARCEL A-9 (NO EXISTING BUILDING)	0 REQUIRED
TOTAL REQUIRED W/O MIXED USE REDUCTION	504 SPACES
TOTAL PARKING REQUIRED W/ MIXED-USE REDUCTION	472 SPACES

PARKING PROVIDED

PARCEL A-3	57 SPACES
PARCEL A-4	209 SPACES
PARCEL A-8	63 SPACES
PARCEL A-9	148 SPACES

TOTAL PARKING PROVIDED

477 SPACES

			MIXED USE PARKING REDUCTION ANALYSIS				5-May-05					
			FLOWER HILL PARCELS A-3, A-4, A-8 &A-9				(Rev 7-11-05)					
			(Developed Conditions)				(Rev 9-24-07)					

Parking Analysis from Development/Land Use Plan for Parcels A-3, A-4, A-8 and A-9, Ex. 36

PARKING ANALYSIS — PARCELS A-3, A-4, A-8, & A-9																			9/24/2007	
PARCEL NO. AS SHOWN ON PLAT		PARKING REQUIRED ANALYSIS					ADDITIONAL GFA BREAKDOWN (SF)					EXISTING GFA BREAKDOWN (SF)			Surplus Parking Analysis -Existing					
Existing Parking Spaces - Pre-Developed Conditions	Parking Required w/o Mixed-Use Reduction (Office, Medical, & Health Club)	Parking Required w/o Mixed-Use Reduction (Retail)	Parking Required w/o Mixed-Use Reduction (Restaurant)	Total Parking Required w/o Mixed-Use Reduction	Parking Provided w/ Mixed-Use Reduction	Parking Required for Addition al GFA only	Total Additional GFA on Parcels A-3, A-4, A-8, & A-9 (SF)	Additional Office Parcels A-3 & A-4 & Retail (SF)	Additional Restaurant w/ 1200 SF of Patron Area (SF)	Additional Health Club on A-4 (GFA)	Existing GFA on Parcel A-3 (SF)	Existing Medical - Two practitioners on Parcel A-3 (SF)	Existing Restaurant w/ Patron Area of 1198 SF on Parcel A-8 (SF)	Total Existing GFA	Parking Required for Existing Mixed-Use Reduction	Parking Required w/ Mixed-Use Reduction	Surplus Parking under Existing Use			
A-3	82	76	0	0	76	57	36	12,000	12,000	0	0	0	12,800	3,200	0	0	16,000	40	42	
A-4	186	247	0	25	272	209	92	24,000	20,800	0	3,200	0	60,000	0	0	0	60,000	180	16	
A-8	60	0	12	30	42	63	0	0	0	0	0	0	0	0	2,396	2,396	4,792	42	18	
A-9	0	113	0	0	113	148	113	30,500	16,000	0	0	14,500	0	0	0	0	0	0	Vacant	
Total	338	437	12	55	504	477	242	66,500	48,800	0	3,200	14,500	72,800	3,200	2,396	2,396	80,792	262	95	
A-5	84		0	48	48	84	0	0	0	0	0	0				4,143	4,143			
A-6	32	23 (Auto)	0		23	32	0	0	0	0	0	0			3,936 (Auto)		3,936			
A-7	11	5 (Bank)	0		5	11	0	0	0	0	0	0	1500 (Bank)				1,500			
Total	465	465	12	103	580	604	0	0	0	0	0	0					262			
Notes:		Total Parking Required =		519 spaces																
		Total Parking Provided =		606 spaces																
1 Required parking analysis shown is based on office use for Parcel A-4. Health Club use is to be at Parcel A-9.																				
2 The development plan amendment is limited to four recorded parcels - part of Master Plan Parcel 31.																				
3 Parcels A-5, A-6, & A-7 (part of Master Plan Parcel 31) are not a part of the proposed amendment and are not included here.																				
4 Parcel A-10 is a common parcel for internal access drive only w/o any building and is not included here.																				
5 See Mixed-Use Reduction Parking Analysis for Parking Required under Developed & Existing Conditions																				

D. Master Plan

The subject property is within the area covered by the *1985 Approved and Adopted Gaithersburg Vicinity Master Plan* (the “Master Plan”), which identified the site as part of Parcel 31 and recommended it for retail/commercial use under the Planned Neighborhood zoning classification. See Staff Report at 3. Staff reports that the plan describes the significance of the Planned Neighborhood zoning classification for the Flower Hill Planned Neighborhood and for the subject site (Staff Report at 4, quoting Master Plan at 49) as follows:

The P-N Zone area for Flower Hill today is 266 acres and is planned for approximately 1,300 dwelling units. The developer of the planned neighborhood also owns several other adjoining parcels and would like to combine these areas with the Flower Hill development to form a unified community. The Flower Hill community, when completed, will be oriented to a centrally-located 24-acre park/school proposed in the development plan for this site.

This Plan recommends the addition of 60 acres to the Flower Hill Planned Neighborhood. One parcel (Area 32) is recommended to encourage the development of garden apartments in accord with the provisions of the Flower Hill P-N Zone. Two other parcels (Areas 30 and 31) which are recommended for inclusion in the Flower Hill P-N are recommended for commercial and office development.

Staff notes that the Master Plan also recommends, on page 4, that “a convenience retail shopping center, at least ten acres in size, be provided, along existing MD 124 to serve existing and future residential development.” Staff also quotes from the plan’s Technical Appendix, at page 36:

In order to achieve a greater geographical balance of convenience shopping, this Plan recommends an additional site in the Airpark area for a full-size convenience shopping center to serve the Flower Hill Planned-Neighborhood.

Staff found that the proposal to increase commercial and retail space on the subject site conforms with the Master Plan’s general land use and zoning recommendations. See Staff report at 4. Staff then suggested that in recommending the Planned Neighborhood Zone, the Master Plan was “attaching qualities associated with ‘planned developments,’ such as plentiful open space and landscaping, attractive and cohesive design, and good pedestrian links to the subject site.” Staff Report at 4. Despite an overall recommendation of approval, the Staff Report expressed reservations

about the proposed development, describing it as “creating three unrelated commercial buildings to [sic] an existing planned development, rather than a unified planned development with such expected characteristics as plentiful open space and planting, appropriate buffering with neighboring residential developments, and generous connecting pedestrian links.” *Id.* at 5. These statements culminate in a recommendation that site plan review include reducing the intensity of development on Parcel A-9 and providing more open space, trees and other landscaping as buffering for the Emory Grove Subdivision located along Washington Grove Lane, planting a row of native deciduous trees along the property’s northeast edge along Woodfield Road and along its southeast edge on Flower Hill Way, and enhancing the pedestrian circulation system by providing safe and convenient links within the site and to adjacent residential developments. *See id.*

The Applicant’s submitted site drawings and testimony provide ample evidence that pedestrians have easy access to this site and an extensive network of sidewalks within the site. All three roads where the property has frontage have sidewalks on at least one side. The three adjacent intersections are signalized and have crosswalks. Within the site, each parcel is fully or partially ringed by sidewalks, and most buildings have lead-in sidewalks from the perimeter of the parcel or from the parking lot. The Applicant expressed a willingness to install additional sidewalk segments, should such additional paving be requested at site plan review.

Testimony and photographs provided by the Applicant’s land planner demonstrate that distance, topography, existing landscaping and building orientation combine to make the development proposed for Parcel A-9 compatible with the nearby homes in the Emory Grove Subdivision. As shown on the photograph below, the townhouses located across the old MD 124 right-of-way from Parcel A-9 are oriented with their sides or rear corners facing the subject property, not their front yards or rear yards, which likely get more use. Mr. Perrine testified that these townhouses are separated from the location proposed for the building on A-9 by a row of trees and a distance of about 110 feet. He noted that the two-story townhouses also sit at a higher elevation, approximately 20 to 25 feet above the grade of the proposed two-story building. The difference in elevation would tend to minimize the size of the new office building, which would be no more than 30 feet in height.

Photograph of Parcel A-9 and Nearby Townhouses, Ex. 49(a)

The Hearing Examiner notes that, as shown on the aerial photograph on page 9, some of the single-family detached homes in the Emory Grove Subdivision, near Flower Hill Way, are situated approximately the same distance from the subject site as the townhouses.

Technical Staff's comments about the expected characteristics in the Planned Neighborhood Zone may be somewhat misplaced. Mr. Perrine pointed out that the purpose clause for the Planned Neighborhood Zone does not refer to elements such as "plentiful open space and landscaping" or "attractive and cohesive design," although these elements play a significant role in the purpose clause for the Planned Development (PD) Zone, a zone that is much more commonly used than the Planned Neighborhood Zone. See Tr. Dec. 17 at 22-23. The purpose clause for the Planned Neighborhood Zone refers to "good planning principles" and describes a neighborhood as "an urban area within which the residents may all conveniently share common services and facilities." Code § 59-C-7.3. The purpose clause calls for walkways to provide for safe, direct and convenient movement of pedestrians, but says nothing about open space, landscaping or design. The Hearing Examiner is reluctant, therefore, to read these elements into the Master Plan

recommendation for the subject site. The proposed development is clearly consistent not only with general objectives of the Master Plan but with its specific recommendations for the subject site. Any additional landscaping or minor adjustments to the proposed improvements that the Planning Board considers appropriate may be required at site plan review, but are not necessary to establish the Master Plan conformity and compatibility required at the zoning stage.

E. Public Facilities

Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, schools, water and sewage facilities, and police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy and biennially in the two-year AGP Policy Element.³ While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a development plan amendment case, because the Council bears the responsibility to determine whether approval of the amendment would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at this stage is particularly important because of the discretionary nature of the Council's review and the opportunity for a broader review than may be available to the Planning Board at subdivision. The District Council is charged at this stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

³ See *2007-2009 Growth Policy, Resolution No. 16-376*, adopted November 13, 2007. The Hearing Examiner hereby takes official notice of the 2007-2009 Growth Policy.

1. Transportation

This application was submitted in March, 2007, when the 2003-05 AGP Policy Element was still in effect.⁴⁴ The Staff Report was issued on November 19, 2007, six days after the County Council enacted the 2007-2009 Growth Policy. The Staff Report analyzed the application's compliance under the new growth policy test, although the traffic study had been performed using the old test. This had little practical outcome on the presentation of the case, because the critical lane volume ("CLV") standard is satisfied under both the old test and the new test, and the subject property is located in a policy area that does not require any trip mitigation under the new Policy Area Mobility Test ("PAMR") adopted in the 2007-2009 Growth Policy. The Applicant's submitted traffic study addressed compliance with the 2003-2005 AGP Policy Element standards, and its testimony addressed compliance with the 2007-2009 Growth Policy standards. As outlined below, the evidence demonstrates compliance with both growth policy tests.

Under the 2003-05 AGP Policy Element, most subdivision applications are subject to the Local Area Transportation Review ("LATR") transportation test. The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in making submissions to the Hearing Examiner for zoning cases, which the Hearing Examiner interprets to include development plan amendments. See LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hour of the weekday morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.). The "peak hour" is the 60-minute segment within each three-hour peak period that has the highest level of traffic.

The methodology prescribed under the LATR Guidelines is an analysis of Critical Lane Volume ("CLV"), which counts conflicting movements at an intersection, such as left turns v. through movements, as a means of assessing whether the intersection is performing at an acceptable level or is experiencing unacceptable levels of congestion. The County Council has established congestion

⁴⁴See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

standards for each policy area in the County, which establish the maximum CLV an intersection may have before it is considered to have unacceptable congestion. The congestion standards range from a CLV of 1,400 in rural areas to a CLV of 1,800 in Metro policy areas. See LATR Guidelines at 3. Under both the 2003-2005 AGP Policy Element and the 2007-2009 Growth Policy, a development proposal will be considered to pass LATR if a traffic study acceptable to Technical Staff demonstrates that the intersections studied will have CLVs below the relevant congestion standard with the proposed development in place, taking into account the impact of any proposed traffic mitigation. See LATR Guidelines at 1-2; 2007-2009 Growth Policy at 12.

The Applicant performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt ("background" traffic), and trips expected to be generated by the proposed development. Technical Staff required the Applicant to study the 12 intersections listed below:

- Snouffer School Road at Mooney Drive
- Woodfield Road at Lindberg Drive (south)
- Woodfield Road at site access points
- Woodfield Road at Flower Hill Way
- Woodfield Road at Emory Grove Road
- Woodfield Road at Mid-County Highway
- Woodfield Road at Snouffer School Road/Muncaster Mill Road
- Flower Hill Way at site access point
- Muncaster Mill Road at Air Park Road/Shady Grove Road
- Washington Grove Lane at Emory Grove Road; and
- Washington Grove Lane at Mid-County Highway

The study intersections are located in two policy areas, Derwood and Montgomery Village/Airpark. Adding background traffic and the traffic projected from the proposed development to the existing traffic counts, the traffic study concluded that all 13 intersections would continue to operate within the applicable CLV standards under the 2003-2005 AGP Growth Policy of 1,450 in the Montgomery Village/Airpark Policy Area and 1,475 in the Derwood Policy area. See Ex. 27 at 21. The post-project CLVs calculated in the traffic study are also below the standards specified in the 2007-2009 Growth Policy. The standard for the Derwood policy area is unchanged, while the

standard for Montgomery Village/Airpark Policy Area has been lowered to 1,425. See 2007-2009 Growth Policy attachments, Table 1. This was confirmed by the testimony of the Applicant's traffic planner, Mickey Cornelius. See Tr. Dec. 7 at 78-79.

In Mr. Cornelius' opinion, the traffic study "clearly shows that the traffic impact from this development would be minor." *Id.* at 80. He pointed out that the CLV at the studied intersections would change very little with the proposed development. Mr. Cornelius acknowledged that the post-development CLV at the intersection of Washington Grove Lane and Mid-County Highway would be close to the congestion standard, which he attributes to a heavy southbound left-turn movement in the morning. He believes that if a later study shows a CLV exceeding the standard, the problem can be resolved by building a second left-turn lane with a shared through movement.

Mr. Cornelius stated that the trip generation projected for the subject site was based on a total of 66,000 square feet of new commercial space, broken down to 59,300 square feet of office, 3,500 square feet of additional health and fitness club space and 3,200 square feet of restaurant use. Those uses were estimated to generate 134 new trips during the morning peak hour and 139 new trips during the evening peak hour. Because the traffic study was based on this specific number of trips, the Applicant has included on the Development Plan Amendment a textual binding element that would limit the additional development on the subject site to uses that generate no more than 134 new trips during the morning peak hour and 139 new trips during the evening peak hour. The Applicant preferred to limit the number of trips rather than committing itself to the specific use and square footage figures that were used in the traffic study. In the Hearing Examiner's opinion, limiting the number of new trips will be equally effective as a parameter for subdivision review.

Technical Staff found the Applicant's traffic study acceptable and concluded that the proposed development should have no adverse impact on the safety and adequacy of the transportation system with the infrastructure improvements typically required by the County and SHA, such as proper turning radii, driveway widths and curb cut requirements. See Staff Report at 6; Ex. 33 at 3.

The Planning Board's recommended binding elements include a requirement that the Applicant "work out" with the State Highway Administration ("SHA") a potential contribution by the Applicant to the cost of planned improvements to Woodfield Road. Mr. Cornelius explained that the SHA has identified two projects for Woodfield Road in its consolidated transportation program. The first is to widen the road to six lanes from Airpark Road north to Fieldcrest Road, just north of the study area for the present application. The second involves widening the road from two lanes to four in front of the subject property. The latter project has been funded for engineering, design and right-of-way acquisition, but has not been funded for construction, so Mr. Cornelius did not rely on it as part of his traffic study. He acknowledged that the Applicant may rely on that widening project at subdivision, if the project goes forward, because at that point it may be fully funded for construction. Mr. Cornelius expects that the widening would result in lower CLVs at Woodfield Road's intersections with the site access point and with Flower Hill Way, both of which were part of the traffic study in this case.

Mr. Cornelius opined that the two new access points proposed for the subject property – a right-in, right-out driveway at the north end of the property and a new entrance at the end of the cul de sac on Washington Grove Lane – would provide safe movements, as do the existing access points. He further noted that the site has sidewalks throughout, including along the frontage of all the surrounding roads, as well as lead-in sidewalks at all access points.

2. Utilities

Testimony from the Applicant's civil engineer, Pritam Arora, established that public water, sewer and other utilities are available on site, and that utilities are all underground as required in the Planned Neighborhood Zone. See Tr. Dec. 7 at 56.

3. Schools

The commercial development proposed in this application would have no impact on the public schools.

F. Environment and Stormwater Management

The subject property has few natural resources, with vegetation limited to grass on Parcel A-9 and landscape plantings on the remainder of the site. Technical Staff exempted the property from submitting a forest conservation plan because the proposal is a modification of an existing developed property, with no clearing of forest.⁵ See Staff Report at 8. Staff reports that there are three specimen trees off site near the property line, but construction on the subject property would not affect them. See *id.*

The Department of Permitting Services (“DPS”) has agreed to permit the Applicant to file a stormwater management concept plan when the combined preliminary plan/site plan is submitted to the MNCPPC, rather than in conjunction with the present application. See Ex. 25(h). DPS notes that all land subject to the applicable development plan drains to one of the existing regional stormwater management ponds for the Flower Hill development, therefore quality and quantity controls are already provided for the subject property. See *id.* As a result, DPS does not intend to require any additional on-site detention for this project. DPS intends to require additional water quality controls, but states that these “can be incorporated into the stormwater management concept without affecting the locations of the building and parking areas.” *Id.*

The Applicant’s civil engineer testified that as a redevelopment project, the proposed development would be required to provide stormwater quality treatment for only 20 percent of the site, not the entire property. He believes this can be accomplished with a single facility on Parcel A-9, as shown on the Development Plan Amendment, and noted that there is plenty of room on the site for additional water quality management, should it be found necessary.

G. Market Need

The Zoning Ordinance specifies that a development plan amendment application relating to land in the Planned Neighborhood Zone must include an “economic analysis supporting the

⁵ The standard for such an exemption is no more than a total of 5,000 square feet of forest to be cleared, and no forest clearing within a stream buffer or a Special Protection Area. In fact, however, no forest would be cleared for the proposed development.

inclusion of any proposed local commercial facilities as permitted in” the zone. Code §59-D-1.3(h). The Applicant has submitted two documents and provided expert testimony to fulfill this requirement. The first market analysis submitted by the Applicant declared that the subject site has experienced a low vacancy rate for the last several years, and that when space has opened up, it has often been leased by existing tenants. See Ex. 10. Moreover, the Applicant receives regular inquiries from existing tenants seeking additional space, and from other companies looking for commercial space in the area. Existing tenants have also expressed a desire for a sit-down restaurant on site, as an alternative to the two fast-food establishments. These are all indications of a need in the marketplace for additional commercial space such as proposed here.

The Applicant's second market analysis was more formal, and was prepared by urban economist Elizabeth Davison. See Ex. 42. As described more fully in the Summary of Hearing, Ms. Davison described her methodology, which included defining a trade area, gathering data about population, jobs and existing commercial space, and assessing the level of unmet market demand for general office space, sit-down restaurants and health and fitness clubs. Ms. Davison concluded that there is more than enough market demand to support the amount and types of commercial space the Applicant has proposed to add to the subject site.

Technical Staff in the Research & Technology Center at MNCPPC reviewed the report prepared by Ms. Davison's firm, and concluded that it sufficiently demonstrates that, at least in theory, the defined trade area could absorb additional commercial space as proposed. See Staff Report Attachment 7.

H. Community Participation

The only community interest reflected in the record of this case is a letter from the Flower Hill Central Corporation, Inc., which is an umbrella organization comprised of representatives of each of the 13 homeowners' associations in the Flower Hill Subdivision. See letter dated September 12, 2007 from Linda Horensavitz, attached to Staff Report. The letter indicates that the Applicant presented the proposed development at a meeting of the Flower Hill Central Corporation,

answered questions and addressed any concerns expressed by the community. The letter states that the organization has no concerns with the project moving forward as presented. See *id.*

IV. SUMMARY OF HEARING

A. Applicant's Case in Chief

1. Richard Pettit, Applicant's representative. Tr. Dec. 7 at 25-38.

Mr. Pettit represents the Applicant, which is one of a group of real estate companies wholly owned and operated by the Pettit family. He has been a builder and developer in Montgomery County for about 30 years, and his role in the Pettit companies is to manage the commercial operations, including leasing, upkeep, financing and managing the business association that runs the subject property.

Mr. Pettit testified that in the early 1980s, the Pettit companies purchased a tract of land with over 300 acres that included the subject property. They obtained rezoning to the brand new Planned Neighborhood Zone, pursuant to which they developed 13 neighborhoods constituting Flower Hill. The development has 2,025 dwelling units plus two commercial areas, one of which is the subject of the present application.

The Applicant seeks to amend the development plan to permit the construction of three new buildings. One is intended to house an expansion of a health and fitness club that currently occupies eight units in one of the other buildings. The health club has asked for a larger space with higher ceilings, and the Applicant would like to accommodate that. The other two buildings would provide additional office space to respond to a high level of demand. Mr. Pettit explained that the commercial area within which the subject property is located has been fully leased for the last five to seven years with virtually no vacancies, and when a unit becomes available, it is often leased by an existing tenant looking to expand. In addition, the Pettit companies get quite a few calls from companies looking for commercial space in the area, so they believe the additional office space would be welcome.

Mr. Pettit stated that tenants on the subject property also have requested more eating options on site. Currently, the site has a fast food restaurant and a sandwich shop, but tenants would like to have a sit-down restaurant. The Pettit companies hope to have a restaurant occupy about 3,500 square feet in one of the new buildings.

Mr. Pettit noted that he has discussed the present application on two occasions with the Flower Hill Central Corporation, which is run by community members representing the 13 neighborhoods in Flower Hill and manages all of the common areas except in the commercial districts. He stated that the Central Corporation has no concerns about the basic concept of the proposed DPA or expansion of the commercial space. Their chief concern, as he described it, is to ensure that they get to see the plans again as they become more detailed, before they are approved. Mr. Pettit assured the Central Corporation that they will have the opportunity to participate in the site plan and preliminary plan review.

Mr. Pettit testified that common areas within the commercial district comprising the subject property consist of an interior access road providing access to all the buildings. This road is identified as Parcel A-10 and is owned by the Flower Hill Business Association, a group comprised of the two Pettit family companies and the owner of the bank and the gas station on the subject property. The Flower Hill Business Association is solely responsible for maintenance, repair and snow plowing, and covenants require each business owner on site to contribute to the costs.

Responding to the purposes stated in the Zoning Ordinance for the Planned Neighborhood Zone, Mr. Pettit testified that the size of the development is large enough to generate a child population sufficient to use at least one public elementary school. He noted that the Pettit companies dedicated land for the Flower Hill Elementary School. Mr. Pettit further stated that Flower Hill continues to include retail shopping facilities that area adequate to provided for residents' day to day shopping needs, and that the proposed DPA would further promote this goal. He observed that all major transportation arteries are located on the perimeter of the planned neighborhood, and that the development has an internal, connected pedestrian system that provides safe pedestrian access to the local schools, shopping and recreation areas. This system, Mr. Pettit noted, would be

continued with approval of the proposed DPA, which provides for an extensive sidewalk system. See Tr. Dec. 7 at 36. With regard to the final part of the purpose clause, to have moderately priced housing within the neighborhood, Mr. Pettit noted that Flower Hill includes more MPDUs on site than were required at the time.

Mr. Pettit testified that the Applicant intends to be bound by the testimony given on its behalf in this case, and by the binding elements proffered during the hearing process. See *id.* at 38.

2. Pritam Arora, site planner and civil engineer. Tr. Dec. 7 at 38-64.

Mr. Arora has 37 years of engineering experience, and was designated an expert in site design and civil engineering. He is very familiar with the subject property, having operated his engineering business as a tenant on the subject property for the last 16 years.

Mr. Arora described the subject property and its surroundings. He used an aerial photograph that was taken approximately two years ago to point out various features of the area.

Mr. Arora stated that Parcel A-9, the proposed site for one of the new buildings, is currently vacant. It was designated on the original development plan for a commuter parking lot, but it was never developed for that purpose and the lot is no longer needed. Mr. Arora stated that the building proposed on Parcel A-4 would be the fourth building on that parcel, and would replace excess parking. He described the parking lot on this parcel as much larger than it should have been under the Zoning Ordinance when it was built, and stated that the remaining parking as proposed on the DPA would be adequate. See Tr. Dec. 7 at 45. The third proposed building would be located on Parcel A-3, which currently has one office building, and would also replace existing parking that is not needed. In all, Mr. Arora estimated, the subject site currently has about 100 more parking spaces than it needs.

Mr. Arora described an extensive network of pedestrian walkways linking all of the uses on the subject property with each other and with sidewalks on all of the abutting roadways. He noted that under the DPA, this network would be extended to include the currently undeveloped Parcel A-9. Mr. Arora noted that the sidewalks are possible due to cross-easements on all of the parcels. He specifically pointed out that under the proposed DPA, pedestrians would be able to walk

to the subject site from nearby neighborhoods, using sidewalks that connect to the pathways leading to each of the buildings on the site. He noted that all of the adjacent intersections have traffic lights and crosswalks to ease pedestrian access. Mr. Arora acknowledged that two small sidewalk segments could be added, as recommended by Technical Staff, to provide direct pedestrian connections from off site to the office building proposed on Parcel A-3. See Tr. Dec. 7 at 62. He stated that there would be no difficulty in adding these sidewalk segments at site plan.

Turning to natural resources, Mr. Arora stated that the subject site has no forest, wetlands, flood plain or specimen trees, except for a small area of forest on the south side of the site that serves as a buffer for neighboring residences. He stated that the project will satisfy forest conservation regulations. He testified that stormwater would feed into an existing regional stormwater management pond that was designed to handle drainage from a 200-acre area. Moreover, Mr. Arora added, as a redevelopment project the proposed development would be required to provide stormwater quality treatment for only 20 percent of the site, not the entire property. He believes this can be accomplished with a single facility on Parcel A-9, and noted that there is plenty of room on the site for additional water quality management, should it be found necessary.

Mr. Arora confirmed that public water, sewer and other utilities are available, and that utilities are all underground as required in the Planned Neighborhood Zone. See *id.* at 56. He stated that no roadway dedications are proposed because all of the necessary dedications were made in connection with the original development. Finally, Mr. Arora opined that from a civil engineering standpoint, all requirements of the Planned Neighborhood Zone would be satisfied with the proposed DPA, the proposed development would provide for the maximum safety, convenience and amenity of residents, and the proposed internal vehicular and pedestrian circulation systems and points of external access would be safe, adequate and efficient. See *id.* at 58-59.

Mr. Arora observed that on Parcels A-3 and A-4, the only area disturbed would be about 10,000 square feet. All of Parcel A-9 would have to be disturbed, but a sediment control plan would be put in place. He noted that the level of disturbance would be no greater than that approved on the original development plan, which anticipated a large parking lot on the site.

3. Ali Zargarian, architect. Tr. Dec. 7 at 65-73.

Mr. Zargarian was designated an expert in architecture. He described the current designs for the proposed buildings: a two-story building on Parcel A-3 with 12,000 square feet of space and a height and design similar to the adjacent existing building, which is about 33 feet high at the roof peak (Mr. Zargarian is confident that the building is lower than 30 feet in height as measured under the Zoning Ordinance, at the mid point between the eaves and the roof line); a two-story building on Parcel A-4 with lower level parking (creating a third story as viewed from the rear of the building), 24,000 square feet of space and a design and height similar to the adjacent building, which is about the same height as the building on Parcel A-3; and a two-story building on Parcel A-9 with 30,000 square feet of space, a design similar to the other buildings on the site, and a height no greater than 30 feet. See *id.* at 72. Mr. Zargarian opined that the proposed buildings would be compatible with other buildings on the site, and stated that all three would be 30 feet or less in height.

4. Mickey Cornelius, transportation planner. Tr. Dec. 7 at 74-88.

Mr. Cornelius was designated an expert in transportation planning and traffic engineering. He first described the changes that had been recently made to the Growth Policy, in November 2007. The changes included reductions to the CLV standard in some policy areas and the addition of a new Policy Area Mobility Review test ("PAMR"), which reviews roadway and transit conditions. The traffic study Mr. Cornelius prepared in this case was performed under the Growth Policy standards in effect when the application was filed, but he noted that the procedures for LATR are unchanged. He acknowledged that the CLV standard is now lower in one of the two policy areas involved for this case, the Montgomery Village/Airpark Policy Area, but noted that the proposed project would still satisfy LATR. Mr. Cornelius expects the subject development to satisfy APFO at preliminary plan, under the new Growth Policy standards, provided that it moves forward quickly. He noted that at present, the applicable policy areas do not require any mitigation under PAMR.

Mr. Cornelius described the LATR study he prepared and the basis for his conclusion that the proposed development would satisfy LATR. He also reviewed supplemental information provided by Transportation Planning Staff in an email to the Hearing Examiner, and agreed with their

assessment that if the total of 66,000 square feet of new space were office space, it would generate fewer trips than were projected in the traffic study, but if it were all used as retail space, it would generate significantly more during the evening peak hour. See *id.* at 88. He further opined that the binding element proffered by the Applicant during the hearing, limiting additional development to the number of trips projected in the traffic study, would take care of any potential change in use from the three uses assumed in the traffic study. See *id.*

5. Elizabeth Davison, urban economist. Tr. Dec. 7 at 89-97.

Ms. Davison was designated an expert in market analysis. She described a market study performed by her firm to assess the demand in the area of the subject property for office, restaurant and health club uses. She described her methodology, which started with driving around the area, looking at competing facilities. Ms. Davison's firm then gathered data on employment, population, and household and income growth in the area and found that the area has a very healthy local economy with some growth in population and income. They drew a trade area roughly three miles in size, with an oblong shape driven by barriers such as I-270 and drive times. Considering the amount of Class B office space in the trade area and the number of employees likely to be generated by the local population, Ms. Davison estimated that there is a demand for approximately 1.2 million square feet of local office space. Comparing this to the existing supply of slightly over 500,000 square feet, she concluded that there is a gap of about 700,000 square feet. She noted that rents have been rising, and although the vacancy rate is a bit high, at 9.7 percent, she attributes that to the age of the space, opining that new or renovated space at the subject site would be easily absorbed by the market.

Ms. Davison's firm did a similar analysis for health clubs and restaurants, taking into account the population and how much money people in different income brackets spend on different categories of goods. Ms. Davison concluded that there is a gap of slightly more than 41,000 square feet of restaurant space, suggesting that there is adequate demand to support a new, full-service restaurant at the subject site. This conclusion was based in part on a "fair share" analysis, assuming that the new restaurant would capture the same share of the market as other restaurants.

With regard to health clubs, Ms. Davison's firm obtained statistics from the International Health Club Association showing that a suburban population of the type in the trade area typically has about an 18-percent rate of health club memberships. Comparing this to the square feet per member available, Ms. Davison identified a gap in the market of about 80,000 square feet of health club space. She concluded that the market can easily support the small health club expansion proposed here, and could probably support the size of the proposed health club even if it were all new.

6. Phil Perrine, land planner. Tr. Dec. 17 at 9-33.

Mr. Perrine was designated an expert in land planning. He described the area surrounding the subject property, noting that Technical Staff had designated a rather large surrounding area, and that the relationship between the proposed development and existing uses tapers off as the distance between them increases.

Mr. Perrine opined that the proposed development would fill in and complete a commercial office area within the Flower Hill development, serving the purpose of the Planned Neighborhood Zone to create planned neighborhoods that include conveniently located common services and facilities. He noted that the other elements of the purpose clause would be satisfied, observing that Flower Hill has a public elementary school, provides retail shopping facilities adequate for residents' day to day needs, and has the major transportation arteries generally located at the perimeter of the site.

Turning to the proposed new buildings, Mr. Perrine observed that the building proposed on Parcel A-4 would take advantage of a drop in grade to put in structured parking and remove some at-grade parking. Parcel A-9, he noted, is bordered by an open area that is abandoned right-of-way for the old Woodfield Road. Mr. Perrine stated that the old pavement was covered over with dirt and planted in grass, and all that exists now to demarcate the right-of-way is a row of telephone poles. He noted that the townhouses adjacent to the old right-of-way are oriented with their sides towards Parcel A-9, and there are some evergreens along a cul de sac within the townhouse development that provide screening. Mr. Perrine stated that there is a change in grade, and the two-story townhouses sit about 20 to 25 feet higher than would the office building proposed on Parcel A-9.

Mr. Perrine estimated the distance from the closest townhouses to the location proposed for the new building on Parcel A-9 at approximately 110 feet. He emphasized that the proposed building is shown on the DPA oriented with its corner toward the townhouses, not the back side or the end of the building, and it would be no more than 30 feet in height, sitting 20 to 25 feet below the grade of the townhouses. He also noted that farther south, where Washington Grove Road abuts the subject site, single-family homes back onto Washington Grove Road that appear to be roughly the same distance from the subject site as the townhouses that abut Parcel A-9. Mr. Perrine noted that single-family homes often have more active use of the rear yard, making that space more sensitive than the side yard of a townhouse.

Turning to pedestrian paths, Mr. Perrine noted that the subject site already has sidewalks throughout, including one leading from the existing cul de sac on Washington Grove Road to the adjacent community of single-family homes, located south of the townhouses that abut Parcel A-9.

Mr. Perrine noted that the Master Plan recommended Planned Neighborhood zoning for the subject property because, among other things, Planned Neighborhood zoning would require site plan review, allowing the Planning Board to influence the arrangement of buildings, landscaping, lighting and parking. This, he observed would still be the case with the proposed DPA and associated binding elements, which leave the fine tuning to the Planning Board.

Mr. Perrine pointed out some language in the Community-Based Planning memorandum attached to the Staff Report, which states that in recommending the Planned Neighborhood Zone, the Master Plan was attaching qualities “associated with planned development such as open space, landscaping, cohesive design, [and] good pedestrian links” to the site. Tr. Dec. 17 at 22. Mr. Perrine noted that there is no language similar to that in the Master Plan or in the purpose clause for the Planned Neighborhood Zone. He found that there is, however, very similar language in the purpose clause for the Planned Development (PD) Zone. He stressed that the subject property is classified under the Planned Neighborhood (PN) Zone, not the PD Zone, and the DPA must be evaluated accordingly. *See id.*

Mr. Perrine disagreed with Community-Based Planning Staff that the density proposed for the subject property should be reduced to achieve compatibility. In his view, the proposed development would merely be an extension of the character of the existing development on the site, and the physical relationship of the uses would remain compatible. He noted that there are places in Montgomery County with single-family homes closer than 100 feet to commercial development.

Mr. Perrine opined that the proposed development would have adequate pedestrian connections, appropriate buffering for neighboring residential uses, open space and planting that would support a good planned neighborhood, and a compatible relationship with nearby uses. He further opined that the proposed development would satisfy the purpose clause of the Planned Neighborhood Zone.

V. FINDINGS AND CONCLUSIONS

A. The Proposed Development Plan Amendment

Before approving a development plan amendment, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with the Hearing Examiner's analysis.

- (a) ***That the zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. However, to permit the construction of all MPDUs required under Chapter 25A, including any bonus density units, on-site, a development plan may exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan if . . . [not relevant].***

As set forth in more detail in Part III.D above, the Planning Board, Technical Staff and the Applicant's land planner found that the proposed development would be in substantial compliance

with the use and density indicated in the Master Plan. The Hearing Examiner agrees. The evidence amply demonstrates that the proposed development, as an expansion of the existing commercial center, would be consistent with the Master Plan's specific land use recommendations for this site. The Hearing Examiner finds Technical Staff's concerns, which address compatibility through the Master Plan's zoning recommendation, to be misplaced. The evidence is sufficient to support a finding of compatibility based on the submitted Development Plan Amendment, and any additional landscaping or other minor changes may be required during subdivision review, at the discretion of the Planning Board. After a careful review of all of the evidence pertaining to the Master Plan, the Hearing Examiner is persuaded that the proposed Development Plan Amendment would be consistent with the applicable Master Plan recommendations, including the specific recommendations as to use. The Master Plan does not suggest a recommended level of density, allowing density to be determined based on compatibility with adjacent development and the needs of the community.

There is no evidence to suggest that the proposed development would be inconsistent with the General Plan, the Capital Improvement Program or other county policies such as the Growth Policy.

- (b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.***

1. Purpose of the Zone

The purpose clause for the Planned Neighborhood Zone is set forth in full below, quoting from Section 59-C-7.31.

It is the purpose of this section to provide a method which will facilitate the construction of residential neighborhoods in the county in accordance with good planning principles. The principles, which it is the purpose and intention of this section to encourage and require in planning of such neighborhoods, are based on the assumption that a neighborhood is an urban area within which the residents may all conveniently share common services and facilities. In order to make this possible, the following conditions should exist:

- (a) The size of the neighborhood should be such as will provide a child population sufficient to utilize at least one public elementary school of optimum size and location for convenient and economic operation.
- (b) There should be retail shopping facilities adequate to provide for the day-to-day needs of the residents of the neighborhood.
- (c) To the extent possible, all major transportation arteries should be located at the perimeter of the site. Where this is not possible, a grade-separated pedestrian walkway system must be constructed to provide for safe pedestrian crossing of such heavily traveled roadways. In addition, each planned neighborhood must include bikeways, sidewalks and other appropriate walkways to provide for safe, direct and convenient movement of pedestrians to local schools, shopping and recreation areas.
- (d) Moderately priced housing within the means of families of low and moderate incomes should be available within the neighborhood.

By providing a site for commercial uses within close proximity to the residential neighborhoods of Flower Hill, the commercial center on the subject site helps to fulfill the basic purpose of the zone to create urban neighborhoods within which residents may conveniently share common services and facilities. The additional development proposed in the present application would enhance the fulfillment of this purpose by creating space for new or expanded commercial offerings. The present application does not change the size of the residential neighborhoods, the location of major transportation arteries or the availability of moderately priced housing. Accordingly, the only elements of paragraphs (a) through (d) that pertain to this application are the requirement in paragraph (b) for retail shopping facilities adequate to provide for residents' day-to-day needs, and the requirement in paragraph (c) for bikeways, sidewalks and other appropriate walkways to provide for safe, direct and convenient movement of pedestrians to local shopping areas.

The proposed development would satisfy these elements of the purpose clause by increasing the amount of space available for retail use and expanding the extensive network of sidewalks that provide for safe, direct and convenient pedestrian access to and within the subject site.

2. Standards and Regulations of the Zone

The applicable standards and regulations of the Planned Neighborhood Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that the proposed development would satisfy each of these requirements.⁶

59-C-7.32. Limitation.

No property shall be placed in a planned neighborhood zone except upon application of a person with a financial, contractual or proprietary interest in the property, notwithstanding any provisions of this chapter to the contrary.

No rezoning is requested in this application.

59-C-7.33. Land uses.

Commercial uses are permitted as follows:

(c) All of the commercial uses permitted in the C-1 zone except commercial, recreational or entertainment establishments may be permitted for an area of not more than 15 acres at any one location if the following conditions are met:

(1) A market analysis of the local trade area, filed as a part of the development plan, indicates a need for the amount of commercial use proposed, and

(2) The adopted master plan recommends commercial use within the area covered by the application, or there are not adequate local shopping areas, existing or proposed on a master plan, within a reasonable distance and with reasonable access from the site.

(3) Rooftop mounted antennas and related unmanned equipment building, equipment cabinets, or equipment room may be installed under the guidelines contained in Sec. 59-A-6.14.

The additional development proposed here is similar in character to existing commercial space on the subject site and is consistent with the applicable master plan recommendations. The two submitted market analyses provide an adequate basis for a finding that a need exists for the amount of additional commercial space proposed.

⁶ Standards relevant only to residential development are not included in this analysis.

59-C-7.35. Height of buildings.

The heights of all buildings in the planned neighborhood zone shall be consistent with the limitations set in other zoning classifications for areas of similar density or similar use.

Technical Staff considers the C-1 Zone to be indicative of areas that are similar in density or use, and applies the C-1 Zone's 30-foot height limitation within the Planned Neighborhood Zone. See Ex. 33. The testimony and the textual binding elements of the Development Plan Amendment limit the height of the proposed buildings to a maximum of 30 feet, consistent with this requirement.

59-C-7.36. Utility lines.

All utility lines in the planned neighborhood zone shall be placed underground. The developer or subdivider shall ensure final and proper completion and installation of utility lines as provided in the subdivision regulations, being section 50-40(c) of this Code. Street light standards shall be provided by the developer in accordance with the approved site plan.

The Applicant's engineer testified that all utility lines on the subject property are underground, and would remain so with the proposed Development Plan Amendment.

59-C-7.37. Reservation of land.

The Planned Neighborhood Zone requires the reservation of land for public purposes such as schools, roads and parks. All necessary dedications were made in earlier stages of this development, and no new dedications have been requested by the Planning Board or proposed by the Applicant.

3. Compatibility

The "maximum safety, convenience and amenity of residents" portion of 59-D-1.61(b) is not addressed here because the proposed development is not residential in nature. Compatibility, however, is a requirement for every development plan.

The evidence provided by Technical Staff regarding compatibility was somewhat confusing. Staff and the Planning Board recommended approval, suggesting a finding that the proposed development would be compatible with surrounding land uses. Certain language in the

Staff Report, however, suggests that Staff believes changes may be necessary to ensure compatibility. The Applicant's land planner, Phil Perrine, testified persuasively that the proposed development would be compatible with surrounding land uses because it would not change the nature of the use, and the closest residential properties would be adequately buffered by distance, topography and existing vegetation.

The single-family homes across Washington Grove Lane would experience no change in the nature of the commercial development across the road or the closeness of the buildings, although there would be an intensification of the density and intensity of use. They would be buffered from any impacts associated with this increase in density by the road right-of-way and existing landscape buffering. The townhouses across the former Rte. 124 right-of-way from Parcel A-9 would clearly experience a change with the construction of an office building and associated parking on land that is currently an open, grassy space. However the townhouses are oriented with their sides or rear corners toward the subject property, making them less sensitive to the use of Parcel A-9 than if their front or rear yards faced the subject site. The proposed building would be no taller than 30 feet in height and would sit approximately 20 to 25 feet lower in grade than the townhouses, making its presence less noticeable than if it were on the same grade. Moreover, the townhouses would be buffered from the impact of the new building and activity by a distance of approximately 110 feet between the new building and the closest townhouse, and by existing trees.

Uses confronting other parts of the site would likely experience little impact from the proposed development, being buffered by significant road rights-of-way, open spaces and intervening buildings. Based on the preponderance of the evidence, the Hearing Examiner finds that the proposed development would be compatible with surrounding land uses.

(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

The opinions of the Applicant's traffic expert and civil engineer and the depictions on the submitted plans are sufficient to support a conclusion that the proposed circulation systems and

points of external access are safe, adequate and efficient. The vehicular circulation pattern would be largely unchanged from the current condition, although two new access points and an extension of the internal roadway system would be added to serve Parcel A-9. The extensive sidewalk system would be extended to serve each of the new buildings.

- (d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.**

The site's limited natural resources offer little opportunity to preserve natural features. The evidence indicates that grading would be minimized by constructing the proposed building on Parcel A-4 to take advantage of the natural topography, and a sediment control plan would tend to prevent soil erosion during construction. The application has received an exemption from forest conservation requirements. The evidence concerning stormwater management is sufficient to permit a conclusion, in the context of this developed site, which already incorporates stormwater management, that applicable water resource protection requirements would be satisfied.

- (e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.**

The Applicant has submitted a copy of an existing Declaration of Covenants for the Flower Hill Business Association, which provides for ownership and perpetual maintenance of common areas on the subject site with financial contributions from each property owner and tenant. This document and the explanatory testimony provided by Mr. Pettit are adequate and sufficient evidence that common areas and quasi-public use spaces will be adequately maintained in perpetuity.

B. Public Interest

The applicant must show that the proposed development plan amendment bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities.

For the reasons stated above, the Hearing Examiner agrees with the Planning Board and Technical Staff that the subject application would be in substantial compliance with the recommendations and objectives of the Gaithersburg Master Plan. The positive recommendations of the Planning Board and Technical Staff support a conclusion that the proposed development would be in the public interest. For the reasons discussed in Part III.E above, the Hearing Examiner concludes that the preponderance of the evidence fully supports a conclusion that public facilities would be adequate to accommodate the proposed development and would suffer no adverse impact due to implementation of the Development Plan Amendment.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusions specified below.

1. The requested reclassification to the Planned Neighborhood Zone is in substantial compliance with the use and density recommended by the *Gaithersburg Master Plan*, and does not conflict with the county capital improvements program or any other county plan or policy.

2. The Development Plan complies with the purposes, standards, and regulations of the Planned Neighborhood Zone and provides for a form of development that will be compatible with adjacent development.

3. The Development Plan proposes internal vehicular and pedestrian circulation systems and points of external access that would be safe, adequate and efficient.

4. By its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil, there being virtually no natural features on the site to preserve. Forest conservation requirements under Chapter 22A are not applicable, while requirements for water resource protection under Chapter 19 would be satisfied.

5. The submitted documentation of the intended ownership and method of perpetual maintenance of areas to be used for common or quasi-public purposes is adequate and sufficient.

6. The proposed Development Plan Amendment would have no adverse effects on public facilities and would serve the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Development Plan Amendment Application No. 07-2, seeking to amend the existing development plan approved in conjunction with Zoning Application G-420, be **approved** in the amount requested, subject to the specifications and requirements of the final submitted Development Plan Amendment, Exhibit 46; provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan Amendment approved by the District Council, Exhibit 46, with the changes to the binding elements that were handwritten at the December 17, 2008 hearing added in the same type as the existing text, within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Dated: January 16, 2008

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner